

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

10 ROBERT CANADY, ) Case No. EDCV 10-0392-MLG  
11 Plaintiff, )  
12 v. ) MEMORANDUM OPINION AND ORDER  
13 MICHAEL J. ASTRUE, )  
14 Commissioner of the Social )  
15 Security Administration, )  
16 Defendant. )  
\_\_\_\_\_  
)

Plaintiff Robert Canady seeks judicial review of the Social Security Commissioner's denial of his application for Supplemental Security Income Benefits ("SSI") pursuant to Title XVI of the Social Security Act. For the reasons stated below, the matter is remanded for further proceedings consistent with this opinion.

## I. Facts and Procedural Background

Plaintiff was born on October 20, 1967. He completed the eleventh grade and has no past relevant work. (Administrative Record ("AR") at 15, 83, 137.) Plaintiff filed an application for

1 SSI on February 23, 2006,<sup>1</sup> alleging disability as of April 14,  
 2 2005, due to a psychological impairment and an injury to his right  
 3 hand. Plaintiff's application was denied initially and upon  
 4 reconsideration. (AR at 19, 57, 64.) Plaintiff appeared at a  
 5 hearing before Administrative Law Judge ("ALJ") F. Keith Varni on  
 6 July 18, 2007. However, his attorney was not present and the  
 7 hearing was postponed. (AR at 301-05.) Plaintiff appeared at two  
 8 subsequent hearings before ALJ Varni on September 24, 2007, and  
 9 February 13, 2008. (AR at 281-300.) Plaintiff was represented by  
 10 counsel at both hearings and testified on his own behalf. In  
 11 addition, vocational expert ("VE") Joseph Mooney, and Plaintiff's  
 12 girlfriend, Sherry McKinley, testified at the February 2008  
 13 hearing. (*Id.*)

14 ALJ Varni issued an unfavorable decision on March 10, 2008.  
 15 (AR at 7-17.) The ALJ found that Plaintiff had not engaged in  
 16 substantial gainful activity since the application date of February  
 17 23, 2006, and suffered from the following severe impairment: "a  
 18 musculoskeletal impairment involving the right hand." (AR at 12.)  
 19 As discussed in detail below, the ALJ found that Plaintiff did not  
 20 have a severe mental impairment within the meaning of the Social  
 21 Security Act. Plaintiff's severe hand impairment did not meet the  
 22 requirements of a listed impairment found in 20 C.F.R. Part 404,  
 23 Subpart P, Appendix 1. The ALJ concluded that Plaintiff had no past  
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25       <sup>1</sup> The record indicates that Plaintiff filed a prior  
 26 application on June 9, 2005, which was denied initially and upon  
 27 reconsideration. (AR at 18, 84.) It appears Plaintiff did not  
 28 further pursue that application, and both parties agree that the  
 SSI application at issue in this lawsuit was filed on February 23,  
 2006. (Joint Stip. at 2.)

1 relevant work, but retained the residual functional capacity  
2 ("RFC") to perform light work<sup>2</sup> with the following modifications:

3 [He can engage in] only occasional handling, fingering,  
4 and pushing/pulling with the right upper extremity. He  
5 can frequently (1/3 to 2/3 of the work day) feel with the  
6 right upper extremity. He can frequently crawl and climb  
7 stairs/ramps but can only occasionally climb ladders,  
8 ropes, and scaffolds. He can frequently: work at  
9 unprotected heights; work around moving, mechanical  
10 parts; and operate a motor vehicle. There are no  
11 nonexertional limitations with the left upper extremity.

12 (AR at 13.) Finally, the ALJ determined that Plaintiff was not  
13 disabled because there were a significant number of jobs Plaintiff  
14 could perform in the national and local economy based on the  
15 testimony of the VE. (AR at 14-16.)

16 The Appeals Council denied review on February 17, 2010, (AR at  
17 2-4), and Plaintiff commenced this action on March 15, 2010.  
18 Plaintiff argues the ALJ erred by (1) finding that his mental  
19 impairment was not severe at step two of the disability  
20 determination; (2) improperly disregarding the lay testimony of  
21 Plaintiff's girlfriend; and (3) concluding that Plaintiff retains  
22 the residual functional capacity to perform work in the national  
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25 <sup>2</sup> Light work "involves lifting no more than 20 pounds at a  
26 time with frequent lifting or carrying of objects up to 10  
27 pounds...[A] job is in this category when it requires a good deal  
28 of walking or standing, or when it involves sitting most of the  
time with some pushing and pulling of arm or leg controls." 20  
C.F.R. § 404.1567(b).

1 economy.<sup>3</sup> (Joint Stip. at 2-3.) Plaintiff asks the Court to reverse  
 2 the ALJ's decision and order an award of benefits, or, in the  
 3 alternative, remand for further proceedings. The Commissioner  
 4 requests that the ALJ's decision be affirmed.

5

6 **II. Standard of Review**

7 Under 42 U.S.C. § 405(g), a district court may review the  
 8 Commissioner's decision to deny benefits. The Commissioner's  
 9 decision must be upheld unless "the ALJ's findings are based on  
 10 legal error or are not supported by substantial evidence in the  
 11 record as a whole." *Tackett v. Apfel*, 180 F.3d 1094 (9th Cir.  
 12 1999); *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).  
 13 Substantial evidence means more than a scintilla, but less than a  
 14 preponderance; it is evidence that a reasonable person might accept  
 15 as adequate to support a conclusion. *Valentine v. Comm'r Soc. Sec.*  
 16 *Admin.*, 574 F.3d 685, 690 (9th Cir. 2009); *Lingenfelter v. Astrue*,  
 17 504 F.3d 1028, 1035 (9th Cir. 2007); *Robbins v. Soc. Sec. Admin.*,  
 18 466 F.3d 880, 882 (9th Cir. 2006). To determine whether substantial  
 19 evidence supports a finding, the reviewing court "must review the  
 20 administrative record as a whole, weighing both the evidence that  
 21 supports and the evidence that detracts from the Commissioner's  
 22 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996).  
 23 "If the evidence can support either affirming or reversing  
 24 the ALJ's conclusion," the reviewing court "may not substitute its  
 25 judgment for that of the ALJ." *Robbins*, 466 F.3d at 882.

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27       <sup>3</sup> Plaintiff initially contended that the ALJ improperly  
 28 rejected his credibility. However, that claim was withdrawn. (Joint  
 Stip. at 21-26.)

1       **III. Discussion**2           **A. The ALJ's Conclusion That Plaintiff Does Not Suffer From**  
3           **A Mental Impairment Is Supported By Substantial Evidence**

4           At step two of the sequential analysis, the ALJ found that  
5 Plaintiff's mental impairment was not severe within the meaning of  
6 the Social Security Act. (AR at 12-13.) The ALJ reviewed the mental  
7 health records submitted by Plaintiff and concluded that they do  
8 not demonstrate "any mental limitations that would preclude the  
9 performance of simple, unskilled work activities." (AR at 12.)  
10 Plaintiff argues that these conclusions are not supported by  
11 substantial evidence.

12           A claimant for disability benefits has the burden of producing  
13 evidence to demonstrate that he or she was disabled within the  
14 relevant time period. *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th  
15 Cir. 1995). The existence of a severe impairment is demonstrated  
16 when the evidence establishes that an impairment has more than a  
17 minimal effect on an individual's ability to perform basic work  
18 activities. *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996);  
19 20 C.F.R. §§ 404.1521(a), 416.921(a). The regulations define "basic  
20 work activities" as "the abilities and aptitudes necessary to do  
21 most jobs," which include physical functions such as walking,  
22 standing, sitting, pushing, carrying; capacities for seeing,  
23 hearing and speaking; understanding and remembering simple  
24 instructions; responding appropriately in a work setting; and  
25 dealing with changes in a work setting. 20 C.F.R. § 404.1521(b).  
26 The inquiry at this stage is "a de minimis screening device to  
27 dispose of groundless claims." *Smolen*, 80 F.3d at 1290 (citing  
28 *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987)). An impairment is

1 not severe only if it is a slight abnormality with "no more than a  
2 minimal effect on an individual's ability to work." See SSR 85-28;  
3 *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988).

4 Here the ALJ relied on the opinion of consultative examining  
5 psychiatrist Linda M. Smith, M.D., to conclude that Plaintiff does  
6 not have a severe mental impairment. A consultative examining  
7 physician's opinion amounts to substantial evidence supporting a  
8 finding if it is based on independent clinical findings. *Orn v.*  
9 *Astrue*, 495 F.3d 625, 632-33 (9th Cir. 2007); *Andrews v. Shalala*,  
10 53 F.3d 1035, 1041 (9th Cir. 1995) (holding that where treating  
11 physician's opinion is contradicted by examining physician's  
12 opinion based on independent findings, "it is then solely the  
13 province of the ALJ to resolve the conflict."). "Independent  
14 clinical findings can be either (1) diagnoses that differ from  
15 those offered by another physician and are supported by substantial  
16 evidence, or (2) findings based on objective medical tests that the  
17 treating physician has not herself considered." *Orn*, 495 F.3d at  
18 632 (internal citations omitted).

19 On November 20, 2007, Dr. Smith conducted a complete  
20 psychiatric evaluation of Plaintiff at the request of the  
21 Commissioner. (AR at 158-67.) Dr. Smith reviewed Plaintiff's mental  
22 health records from February 2006, December 2006, and January  
23 through August 2007 and interviewed Plaintiff about his mental  
24 health history. Dr. Smith found Plaintiff to be "not credible at  
25 all" when describing his history and symptoms because he was vague,  
26 inconsistent, evasive, and could not describe the symptoms he  
27 reported in his medical records. (*Id.* at 158-61.) Dr. Smith noted  
28 that the friend who accompanied Plaintiff to the appointment filled

1 out the mental health questionnaire, and that Plaintiff deferred to  
2 "whatever she wrote down" when he could not answer Dr. Smith's  
3 questions. (*Id.* at 161-62.)

4 Dr. Smith reviewed Plaintiff's medications. Plaintiff reported  
5 taking Wellbutrin and Lexapro and showed Dr. Smith bottles that he  
6 picked up from the drug store the day before. Plaintiff also  
7 produced a bottle of Seroquel with a 25-day supply from August 23,  
8 2007. There were still three pills left in the bottle, indicating  
9 to Dr. Smith that Plaintiff was not compliant with medication.  
10 (*Id.*) Plaintiff reported that he could perform activities of daily  
11 living, such as dressing himself, going to the store, walking,  
12 watching television, and making snacks and "easy food if his arm is  
13 okay." His friend reported that he does not relate well to people  
14 and cannot handle cash because he might misplace it. (*Id.* at 163.)

15 Dr. Smith conducted a full mental status exam during which  
16 Plaintiff did not volunteer information spontaneously and was  
17 "barely superficially cooperative." (*Id.* at 163.) She found no  
18 evidence of his claims, significant evidence of exaggeration and  
19 manipulation, and concluded: "The entire interview appears to have  
20 been staged." (*Id.* at 163-64.) Plaintiff's thought process was  
21 coherent and organized and his speech was normal. Dr. Smith found  
22 no evidence of a thought disorder or psychosis, noting that  
23 Plaintiff was "relevant and non-delusional...[with] no bizarre or  
24 psychotic thought content." (*Id.*) Plaintiff did not have suicidal  
25 or homicidal ideation. Dr. Smith noted that Plaintiff "claims to  
26 have every type of hallucination I ask him about which is very rare  
27 outside of some cases of organicity, which [Plaintiff] does not  
28 have." (*Id.*) Plaintiff did not appear to be responding to internal

1 stimuli during the interview.

2       Based on the exam as well as tests of Plaintiff's memory,  
3 concentration, fund of knowledge, insight and judgment, Dr. Smith  
4 concluded that Plaintiff did not have a diagnosable mental health  
5 condition and was not functionally impaired in his ability to work  
6 as a result of any mental impairment. (*Id.* at 164-66.) She found no  
7 evidence supporting his claims, and noted that the symptoms he had  
8 reported in his prior mental health records were not psychotic, and  
9 were only "sometimes seen with stress or depression, but actually,  
10 I don't believe that any of this is credible taking his entire  
11 presentation into account." (*Id.*)

12       The ALJ properly relied on Dr. Smith's report, which is both  
13 based on independent clinical findings and supported by substantial  
14 evidence. Indeed, Dr. Smith's report contains the most thorough and  
15 detailed evaluation of Plaintiff in the entire record; the other  
16 mental health records consist primarily of brief notes of the  
17 symptoms reported by Plaintiff upon intake, medication refill  
18 appointment, and checkbox forms. (See AR at 173-93.) The ALJ also  
19 noted that Dr. Smith's report is consistent with the opinion of  
20 state agency reviewing psychologists, who concluded that Plaintiff  
21 does not suffer from a severe impairment and had no mental  
22 limitations. (AR at 12-13, 239-54.) The ALJ's conclusion that the  
23 mental health treatment records from the Pheonix Clinic reflect  
24 routine outpatient treatment was reasonable, and his rejection of  
25 Dr. Raval's opinion about Plaintiff's mental health was proper  
26 because Dr. Raval is an osteopath and offered an opinion outside of  
27 his area of expertise. (AR at 13.) Accordingly, the ALJ's finding  
28 of no severe mental impairment is supported by "more than a

1 scintilla" of evidence such that this Court "may not substitute its  
2 judgment for that of the ALJ." *Robbins*, 466 F.3d at 882.

3 Finally, Plaintiff's brief argument that the ALJ abrogated his  
4 duty to develop the record is unpersuasive. Plaintiff asserts that  
5 the ALJ was required to seek out mental health treatment records  
6 from August 2007 through February 2008 because Plaintiff answered  
7 affirmatively when asked by his counsel at the February 2008  
8 hearing if he was currently seeing a psychiatrist. He argues that  
9 in the absence of records between those dates, the record was  
10 "insufficient to determine disability." (Joint Stip. at 10-11.)  
11 Although the ALJ is required to "develop the record fully and  
12 fairly and to ensure that the claimant's interests are considered,  
13 even when the claimant is represented by counsel," that duty is  
14 triggered "only when there is ambiguous evidence or when the record  
15 is inadequate to allow for proper evaluation of the evidence."  
16 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir.2001).

17 Under the circumstances of this case, it was not necessary for  
18 the ALJ to further develop the record. As discussed above, the ALJ  
19 had adequate evidence with which to make a step two determination  
20 regarding Plaintiff's mental impairment. The ALJ did not find that  
21 the medical records or opinions of the treating, examining, and  
22 reviewing physicians were ambiguous. Instead, the ALJ reviewed the  
23 differing opinions and adopted Dr. Smith's opinion, which was  
24 supported by substantial evidence. In addition, it is worth noting  
25 that in the two years since the ALJ issued his decision, Plaintiff  
26 has not come forward with any new information suggesting that  
27 the record was ambiguous or not fully developed at the time of  
28 decision. As such, the ALJ did not fail to develop the record, and

1 relief is not warranted on this claim of error.

2       **B. Inconsistencies Between The Vocational Expert's Testimony**  
 3           **And The DOT Require Remand<sup>4</sup>**

4       Plaintiff argues that the VE's testimony was unreliable  
 5 because the VE (1) did not explain inconsistencies between jobs  
 6 identified in the Dictionary of Occupational Titles and the  
 7 functional limitations identified in the hypothetical, and (2)  
 8 provided ambiguous testimony about the exact number of available  
 9 jobs that Plaintiff could perform. (Joint Stip. at 30-33.) For the  
 10 reasons stated below, the Court agrees.

11       At the hearing, the ALJ asked the VE whether jobs existed for  
 12 a person of Plaintiff's background, age, education, work  
 13 experience, and a residual functional capacity to perform simple,  
 14 routine, repetitive, non-public, light work with "minimal  
 15 restrictions to the right upper extremity, limiting reaching and  
 16 handling and fingering to occasional." (AR at 289.) Based on these  
 17 restrictions, the VE responded that such a person would be capable  
 18 of performing the jobs of outside deliverer, ticket taker, and  
 19 counter clerk. (*Id.* at 289-90.) The ALJ continued:

20       ALJ: What's the number of those jobs in the regional economy  
 21 of Los Angeles, Orange, Riverside, and San Bernardino  
 22 Counties?

23       VE: In the broad regional economy, they exist in excess of  
 24 2,000 in several regions, the national economy is up to

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25  
 26       <sup>4</sup> The Court has not reached the question of whether the ALJ  
 27 improperly rejected the testimony of lay witness Sherry McKinley.  
 28 While the issue appears to be close, the ALJ may revisit this issue  
 on remand. If he again discounts Ms. McKinley's testimony on  
 remand, he should be more specific about the reasons for doing so.

1 20,000.

2 (AR at 289-90.)

3 Plaintiff has provided the name, DOT number, and description  
4 of the outside deliverer (DOT 230.667-010) and ticket taker (DOT  
5 737.687-182) positions and points out that they call for frequent  
6 handling, which is inconsistent with the limitation in the  
7 hypothetical to only occasional handling with the right hand.  
8 (Joint Stip. at 30-31.) Plaintiff did not identify any  
9 inconsistencies between Plaintiff's RFC and the counter clerk  
10 position (DOT 249.366-010) and assumed for purposes of argument  
11 that there were none. (*Id.*)

12 Although evidence provided by a VE is generally expected to be  
13 consistent with the DOT, "[n]either the DOT nor the VE . . .  
14 evidence automatically 'trumps' when there is a conflict." SSR  
15 00-4p; *Massachi v. Astrue*, 486 F.3d 1149, 1153 (9th Cir. 2007).  
16 Rather, the DOT raises a rebuttable presumption as to a job  
17 classification, and "[a]n ALJ may rely on expert testimony which  
18 contradicts the DOT, but only insofar as the record contains  
19 persuasive evidence to support the deviation." *Johnson v. Shalala*,  
20 60 F.3d 1428, 1435 (9th Cir. 1995); *Massachi*, 486 F.3d at 1153  
21 (when a conflict between a VE's testimony and the DOT arises, the  
22 ALJ must make an inquiry with the VE and then determine whether the  
23 VE's "explanation for the conflict is reasonable and whether a  
24 basis exists for relying on the expert rather than the [DOT]").  
25 Here, it appears that neither the ALJ nor the VE recognized the  
26 inconsistency, and there is no explanation for the conflict.  
27 Accordingly, the ALJ erred when he relied on the VE's testimony  
28 regarding Plaintiff's ability to perform the outside deliverer and

1 ticket taker positions.

2 Moreover, despite the fact that the counter clerk position  
3 identified by the VE is consistent with the DOT and the limitations  
4 in the hypothetical, the VE did not identify the number of jobs  
5 available in that specific category. Instead, the VE "lump[ed] all  
6 three jobs" together when he testified that "they exist in excess  
7 of 2,000 in several regions, the national economy is up to 20,000."  
8 (Joint Stip. at 33; AR at 289-90.) Thus, remand is necessary  
9 because the Court cannot determine how many counter clerk positions  
10 are available or assess whether that number is significant within  
11 the meaning of the Social Security Act and corresponding  
12 regulations.

13

14 **IV. Conclusion**

15 For the reasons stated above, the decision of the Commissioner  
16 is reversed and remanded for proceedings consistent with this  
17 opinion.

18

19 Dated: October 15, 2010

20 MARC L. GOLDMAN

21 \_\_\_\_\_  
22 Marc L. Goldman  
23 United States Magistrate Judge

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